

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA BARNES NELSON

Claimant

VS.

SPRINT

Respondent

AND

**AMERICAN CASUALTY CO. OF
READING, PA**

Insurance Carrier

Docket No. **1,049,783**

ORDER

Both parties requested review of the March 19, 2010 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on July 10, 2012.

APPEARANCES

Judy A. Pope of Leawood, Kansas, appeared for the claimant. Daniel N. Allmayer of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant suffered a 14.5 percent functional impairment to each upper extremity. The parties further agreed that the December 13, 2011, deposition of Linda Gail Barnes Nelson is not part of the evidentiary record.

ISSUES

It was undisputed claimant suffered work-related repetitive trauma injuries to her bilateral upper extremities which resulted in a 14.5 percent functional impairment to each

upper extremity. But claimant alleged she also suffered permanent injury to her neck which the respondent disputed. The Administrative Law Judge (ALJ) determined claimant suffered permanent injury to her cervical spine as well as her bilateral upper extremities. Consequently, the ALJ further determined claimant was entitled to compensation for a whole body permanent impairment pursuant to K.S.A. 44-510e and awarded claimant compensation for a 61.75 percent work disability based upon a 100 percent wage loss and a 23.5 percent task loss. The ALJ denied claimant future medical benefits. Both claimant and respondent requested Board review of the ALJ's Award.

Claimant notes the Kansas Workers Compensation Act (Act) was amended effective May 15, 2011, but the date of accident in this case was March 9, 2010 and the law in effect on the date of accident controls. Consequently, claimant argues it was improper for the ALJ to apply the new law amendments regarding future medical treatment in this case. Claimant requests the Board to reverse the denial of future medical treatment and find future medical treatment should be awarded upon proper application to the Director. Otherwise, claimant requests the Board to affirm the ALJ's Award.

Respondent argues the claimant did not suffer an injury to her neck arising out of and in the course of her employment. In the alternative, respondent argues claimant did not suffer any permanent impairment to her neck as a result of the accidental injury. Respondent requests the ALJ's Award be affirmed regarding future medical.

The issues for Board determination include: (1) whether claimant suffered injury to her cervical spine arising out of and in the course of her employment and, if so, the nature and extent of her disability; and, (2) whether claimant is entitled to an award of future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Ms. Linda Barnes worked as a customer service representative for respondent. Claimant worked 40 hours a week with occasional overtime. She described her job duties:

Basically my duties were to take inbound and outbound calls. Basically I would sit at a computer all day, answer the calls, and basically take notes in every dispute and customers' complaints or assisted customers in anything that they may need when they call in.¹

¹ R.H. Trans. at 6.

Claimant was constantly on the computer the whole day with her arms extended in order to use the keyboard. At the same time she would be answering the telephone and helping customers with their complaints. Claimant testified she would get headaches, had tension in her neck and shoulders as well as tingling in her hands. She began to notice that her headaches would start about an hour after she began working. Her neck would hurt first and then it would go down into her left shoulder and continue to her elbow and hands. Claimant had the same symptoms in her right wrist and hand.

Claimant had a quota which required answering a set amount of phone calls and typing accurate notes into the computer every seven minutes. She testified:

Q. Okay. And, then you mentioned your -- both your left and your right wrists and hands. Can you tell us about those symptoms.

A. Well, a lot of the times as I'm typing, I would just notice that I would have a really excruciating pain in both. And I'd have to kind of slow down, but, of course, I -- at that moment I couldn't; so it would be, you know, pain, tingling in both --

Q. Okay. How long --

A. -- while I was typing.²

Over the course of three years working for respondent, claimant's pain increased in both her arms, wrists and hands.

In January 2010, claimant saw her family nurse practitioner with left arm complaints and apparently was referred for an EMG/nerve conduction study in February 2010. Thereafter, claimant notified respondent and was referred to Concentra on February 24, 2010. Claimant filled out a patient information form which included a diagram which she filled in demonstrating bilateral upper extremity problems but did not include the neck. Respondent then referred claimant to Dr. Bradley Storm for treatment.

Dr. Storm, a board certified plastic surgeon, first examined and evaluated claimant on March 25, 2010. The doctor's notes indicated that claimant did not have any complaints of neck pain. But claimant testified that she did tell Dr. Storm she was having neck pain.

Dr. Storm diagnosed claimant with three problems on each hand. Carpal tunnel syndrome was documented on the EMG test. Upon physical examination, the doctor found cubital tunnel syndrome and de Quervain's on each hand. On April 21, 2010, Dr. Storm performed a left cubital tunnel release without subcutaneous transfer, a left de Quervain's release and a left endoscopic carpal tunnel release. Then on May 21, 2010, claimant had

² *Id.* at 11.

these same procedures done on her right side. Based on the *AMA Guides*³, Dr. Storm rated claimant's bilateral upper extremities at 10 percent to each extremity. Dr. Storm released claimant to return to full-duty work on July 29, 2010.

Dr. Storm reviewed the list of claimant's former work tasks prepared by Ms. Michelle Sprecker and concluded claimant could perform all of the 15 tasks for a 0 percent task loss. Dr. Storm reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could perform all of the 17 tasks for a 0 percent task loss.

The doctor reviewed claimant's medical records and he didn't see any mention of claimant's neck pain. Dr. Storm testified:

In my experience with her, she did not complain of significant neck pain. And I don't see how within reasonable medical certainty we can consider her work at Sprint the cause of the neck pain that she didn't have while I was treating.⁴

Dr. Lynn Ketchum, board certified in plastic and hand surgeries, examined and evaluated claimant on November 16, 2010, at her attorney's request. The doctor was asked to perform an independent medical examination and determine a rating. Claimant reported to Dr. Ketchum that she was having aching and swelling in her hands as well as occasional tingling and aching of the right third digit. She also advised the doctor about her neck and shoulder tension. Dr. Ketchum reviewed claimant's medical records and diagnosed claimant with healing bilateral carpal tunnel syndrome, bilateral cubital syndrome, bilateral de Quervain's syndrome and stenosing tenosynovitis of the right third digit along with cervicgia. Upon physical examination, Dr. Ketchum found mildly positive Tinel's signs at both wrists, tenderness over the A1 pulley of the right third digit, and trigger points in her neck over the trapezius muscles for which he recommended physical therapy including deep massage to those areas. Dr. Ketchum placed work restrictions of no repetitive gripping or typing more than 40 percent of the time.

Based on the *AMA Guides*, Dr. Ketchum rated claimant's right upper extremity at 17 percent and her left upper extremity at 15 percent. "It is my opinion, within a reasonable degree of medical certainty, that the prevailing factor in causing her diagnoses and clinical findings was the repetitive work including typing all day at Sprint/Nextel."⁵

Dr. Steven Hendler, board certified in physical medicine and rehabilitation, examined and evaluated claimant on February 4, 2011, at the request of respondent's

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁴ Storm Depo. at 28-29.

⁵ Ketchum Depo., Ex. 2 at 2.

attorney. Dr. Hendler reviewed claimant's medical records and also took a history from her. Upon physical examination, the doctor found claimant had tenderness to palpation without triggering of the upper medial trapezius on the left as well as the levator scapula muscle; mild tenderness to palpation of the right levator scapula; and Tinel's sign was positive at the right wrist. Dr. Hendler diagnosed claimant with the following: (1) repetitive strain to bilateral upper extremities; (2) status post bilateral median nerve releases, ulnar nerve releases and tenosynovectomies; and, (3) myofascial pain. Dr. Hendler opined that it was less probable than not that the myofascial neck pain was related to work because even though claimant said the neck symptoms were longstanding the medical records did not record the problem until 2010. Nonetheless, Dr. Hendler recommended muscle relaxers and also physical therapy. The therapy program should consist of 6-10 sessions of treatment with the focus on soft tissue/manual therapy and home exercises. Dr. Hendler opined that claimant would likely have ongoing symptomatology in the neck even with treatment.

On March 18, 2011, claimant returned for a follow-up appointment to determine the implementation of her treatment. Upon physical examination, Dr. Hendler diagnosed claimant with myofascial pain due to widespread tenderness to light or deep palpation more so on the left than on the right in her neck area. The doctor placed claimant at maximum medical improvement.

On June 27, 2011, Dr. Hendler was asked to provide a permanent partial impairment rating. Based on the *AMA Guides*, the doctor placed claimant in the cervicothoracic DRE Category I which represents a 0 percent permanent partial impairment rating due to her cervicothoracic symptoms. Dr. Hendler reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could perform all of the 17 tasks for a 0 percent task loss.

On December 21, 2011, Dr. Ketchum re-examined claimant at the request of her attorney. Upon physical examination, the doctor found claimant had pain mainly on the left lateral deviation and also persistent signs of overuse syndrome when doing typing at home or folding clothes for extended periods of time. Claimant had tenderness in her neck and elbows. Dr. Ketchum recommended periodic myofascial massages for the myofasciitis involving her neck. The doctor also recommended restrictions of no repetitive gripping or pinching more than 4 times a minute and no lifting more than 2 pounds away from her body as recommended by Dr. Poppa.

Based on the *AMA Guides*, Dr. Ketchum rated claimant's overuse syndrome for her bilateral upper extremities at a 10 percent impairment and also another 10 percent impairment for her bilateral ulnar neuritis. Using the Combined Value Charts, both 10 percent impairments combined result in a 19 percent impairment to each upper extremity. The doctor also provided a 5 percent whole body impairment due to her myofasciitis in her neck. Dr. Ketchum opined that claimant's poor posture had produced the myofasciitis in her neck.

Dr. Ketchum reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 8 of the 17 tasks for a 47 percent task loss.

Dr. Ketchum opined that there was an additional restriction of no repetitive elbow flexion more than 90 degrees that should be placed on claimant. The doctor opined the prevailing factor for causing claimant's diagnoses was her repetitive work for respondent and also her poor posture that had caused the myofasciitis in her neck which then caused the three additional syndromes such as carpal tunnel, cubital and de Quervain's.

At the request of claimant's attorney, Dr. Michael Poppa, board certified in occupational and preventive medicine, examined and evaluated claimant on August 8, 2011, for purposes of an independent medical evaluation. The doctor reviewed claimant's medical records and also took a history from her. Upon physical examination, Dr. Poppa found claimant had complaints on palpation overlying the surgery sites of her bilateral elbows, forearms and wrists; hand grip was decreased on the right with manual testing; cervical range of motion was functional with pain involving left rotation; there is evidence of chronic myofasciitis with increased muscle tension and indurated tender points upon palpation of the cervical paraspinous muscles, especially on the left as well as her bilateral trapezius muscles; and claimant complained on palpation overlying her left thumb CMC joint.

At the time of the examination, Dr. Poppa determined that claimant had reached maximum medical improvement regarding her series of traumas involving her work-related injuries. The doctor opined that claimant's job duties were the direct and proximate cause of her resulting work-related injuries regarding her cervical spine and bilateral upper extremities. Dr. Poppa recommended a TENS unit, myofascial release techniques and trigger point injections as well as oral medications as additional treatment involving her cervical spine due to increased myofascial pain. Claimant should continue her home exercises for strengthening and range of motion of her bilateral wrists and elbows.

The doctor placed permanent restrictions on claimant of: (1) no gripping or grasping greater than 4 times per a minute; (2) she should alternate every hour of typing duties with non-repetitive duties involving her hands; and, (3) avoid working with her arms away from her body while lifting greater than 2 pounds on an occasional basis.

Based upon the *AMA Guides*, Dr. Poppa rated claimant's cervical spine with residuals at a 5 percent (DRE Category II) whole person impairment. Right upper extremity ratings included: 10 percent as a result of the mild severity of the ulnar nerve release at the elbow; 5 percent to the forearm and wrist due to de Quervain's tenosynovitis with post-operative residuals; and, 20 percent to the wrist which was due to the moderate median nerve entrapment. The right upper extremity impairments combine for a 32 percent impairment which then converts to a 19 percent whole person impairment.

Dr. Poppa's left upper extremity ratings included: 10 percent impairment due to the mild severity result of the ulnar nerve release at the elbow; 5 percent due to residuals involving her forearm and wrist as a result of status post de Quervain's release; and 20 percent moderate median nerve entrapment at the wrist. The left upper extremity impairments combine for a 32 percent impairment which then converts to a 19 percent whole person impairment. When combining the cervical spine, right and left upper extremities whole person impairments results in a 37 percent whole person impairment.

Dr. Poppa reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 8 of the 17 tasks for a 47 percent task loss.

Dr. Poppa opined that claimant's mechanism of injury involving her upper extremities and working in a fixed position with her head bent was consistent with a cervical condition, cervical strain. Claimant had objective evidence of chronic myofascial residuals involving her neck area, cervical paraspinous muscles.

Dr. Poppa testified:

Q. -- in your response. Can you explain why you thought that her job requirements were significant to your evaluation of her neck injury?

A. Because of the contribution of her bilateral upper extremity conditions in repetitive typing, gripping, grasping, she was seated in a chair, relatively let's say fixed or not very flexible as far as positioning. You're under a quota. You are under the gun. You have to produce so many calls or results, whatever her status was, whatever the situation was. You're tense, tight. You have your upper extremities out in front of you and that repetitive back and forth use of your hands as well as a seated position for prolonged periods of time. If she hadn't have had physical findings, I wouldn't have assigned any impairment.⁶

Dr. Poppa opined that jobs requiring an individual to perform repetitive tasks being in a fixed position for extended periods of time under pressure causes the muscles to tense up and get tighter. The doctor testified that:

Ms. Nelson's work duties in which she was required to sit constantly, take calls from customers, type, maybe quotas and clearing as many calls as possible was the prevailing factor in causing the increased muscle tension, the chronic myofascial conditions involving her cervical spine, cervical paraspinous muscles.⁷

⁶ Poppa Depo. at 13.

⁷ Poppa Depo. at 15.

He further opined that claimant's work duties were the prevailing factor in causing her bilateral upper extremity conditions.

Respondent argues that claimant failed to meet her burden of proof to establish that she suffered a work-related permanent injury to her cervical spine. Claimant testified that she had neck pain from the onset and advised the physician but that her initial concern was for her bilateral upper extremities which required three surgical procedures to each extremity. She then sought treatment for her continuing neck complaints which were diagnosed by Drs. Ketchum, Poppa and Hendler. Moreover, Dr. Hendler provided treatment for claimant's cervical complaints. Thereafter, Drs. Ketchum and Poppa attributed claimant's neck condition to her work-related activities but Dr. Hendler found such causation tenuous. The ALJ found Drs. Ketchum and Poppa more persuasive and concluded claimant had met her burden of proof to establish she suffered a work-related cervical injury. The Board agrees and affirms.

Respondent next argues, in the alternative, claimant failed to meet her burden of proof to establish that she suffered any permanent impairment to her cervical spine. Drs. Ketchum and Poppa concluded claimant had suffered a 5 percent impairment to her cervical spine and Dr. Hendler concluded claimant had a 0 percent impairment. The ALJ again found Drs. Ketchum and Poppa more persuasive than Dr. Hendler. Likewise, the Board agrees and affirms. Moreover, the Board affirms the ALJ's finding claimant suffered a 61.75 percent work disability.

Although not addressed by either party, claimant's bilateral injuries give rise to a presumption of permanent total disability. Claimant did not argue that she was permanently totally disabled, but the record shows she did not engage in any substantial and gainful employment after her employment with respondent was terminated. Nonetheless, no physician or vocational expert indicated that claimant was unable to engage in substantial gainful employment. And although claimant did experience a loss of her ability to perform prior work tasks, there were numerous tasks that claimant retained the ability to perform. From those tasks and based upon the restrictions given by the physicians, it is probable that claimant retained the ability to perform jobs. The presumption of permanent total disability is overcome.

Claimant argues the ALJ erred by applying the amended version of K.S.A. 44-510h to this claim. The Board agrees.

The ALJ denied claimant future medical treatment and cited language from K.S.A. 2011 Supp. 44-510h(e). K.S.A. 44-510h, as amended effective May 15, 2011, is not applicable to this claim because that provision was not in effect when claimant sustained her accidental injuries on March 9, 2010, and it may not be retroactively applied to this claim. The amended version of K.S.A. 44-510h affects the substantive rights of the parties and respondent does not argue otherwise. Clearly, the amended statute is not intended to make a mere procedural change. There is nothing in the language of the New Act which

suggests that the legislature intended K.S.A. 2011 Supp. 44-510h(e) to apply retroactively. On the contrary, as noted by our Supreme Court in *Bryant*⁸, only one provision of the New Act is specifically given retroactive application, K.S.A. 44-529(c). Had the legislature intended that K.S.A. 2011 Supp. 44-510h(e) should apply to claims involving accidents before May 15, 2011, it easily could have included language to accomplish that end. Consequently, claimant is entitled to future medical upon proper application to the Director.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 19, 2012, is modified to find claimant is entitled to future medical upon proper application to the Director, and affirmed in all other respects.

IT IS SO ORDERED.

Dated this 14th day of September, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

⁸ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

⁹ K.S.A. 2010 Supp. 44-555c(k).